Fafing bin Khamis & Anor v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 41S-185 OF 2010
ZAMANI A RAHIM J
19 JULY 2011

Evidence — Circumstantial evidence — Inferences from facts — Whether sufficient evidence to support conviction — Whether conduct of accused leading police to discovery of stolen items admissible — Whether misdirection by magistrate on standard of proof occasioned miscarriage of justice — Whether misdirection curable under s 422 of the Criminal Procedure Code

The appellants were found guilty by the magistrate's court on a charge of stealing 1.6 million units of integrated circuits ('microchips') worth RM700,000 from a factory in which they worked as security guards. Each of them was sentenced by the court to two years jail and fined RM10,000 in default six months jail for the offence. The appellants appealed to the High Court against conviction and sentence. The witnesses called by the prosecution testified that (i) both appellants were on guard duty on the night in question, with the first appellant being the leader of the night shift (ii) the CCTV recording of the scene of the incident had stopped functioning for an hour from 9.30pm and (iii) the microchips were kept on a trolley which had a padlock and its safety/security was the first appellant's responsibility. A CCTV technician had testified that well before the theft took place, the second appellant had sought to obtain from him the computer password that operated the CCTV but because the second appellant did not know how to use the computer, the first appellant had contacted him on how to use the password. Following the discovery of the theft, the appellants led police to a place in the factory where some of the stolen microchips were found. The first appellant thereafter led police to a house where more of the stolen items were recovered. Police raids at two other venues recovered even more of the stolen microchips. A person who had bought microchips from the first appellant on five different occasions was called to testify. The appellants were convicted based on circumstantial and inferential evidence.

Held, dismissing the appeals:

(1) The prosecution had established sufficient evidence of a pre-arranged plan between the appellants to commit the theft and that it was carried out in concert pursuant to that plan (see para 21).

(2) There was sufficient evidence to support the conviction in this case. The conviction was safe. The misdirection by the magistrate on the standard

of proof on the appellants had not occasioned a miscarriage or failure of justice. The trial was conducted in substantial compliance with the Criminal Procedure Code and the misdirection was curable under s 422 of the Code (see para 42).

(3) The appellants' conduct in leading police to the discovery of the exhibits — from the steel cabinet in the factory and from the house occupied by SP8 (who bought the microchips from the first appellant) — was admissible under s 8 of the Evidence Act 1950 and such evidence could be used to corroborate and strengthen the prosecution's case (see para 28).

(4) The sentences imposed on the appellants were adequate in the circumstances of the case (see para 43).

[Bahasa Malaysia summary

Perayu-perayu didapati bersalah oleh mahkamah majistret atas tuduhan mencuri 1.6 juta unit litar bersepadu ('mikrocip') bernilai RM700,000 daripada kilang di mana mereka bekerja sebagai penjaga keselamatan. Setiap mereka dijatuhkan hukuman oleh mahkamah dua tahun penjara dan denda RM10,000 jika ingkar enam bulan penjara untuk kesalahan tersebut. Perayu-perayu merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman. Saksi-saksi yang dipanggil oleh pihak pendakwaan memberi keterangan bahawa (i) kedua-dua perayu adalah bertugas pada malam yang dipersoalkan, di mana perayu pertama sebagai ketua untuk shif malam (ii) perakaman CCTV kejadian telah berhenti berfungsi selama satu jam dari 9.30 malam dan (iii) mikrocip disimpan atas troli yang mempunyai mangga dan keselamatan/sekuritinya adalah tanggungjawab perayu pertama. Juruteknik CCTV telah memberi keterangan bahawa sebelum kecurian berlaku, perayu kedua telah memohon untuk mendapatkan daripadanya kata laluan komputer yang mengoperasi CCTV tersebut tetapi perayu kedua tidak pandai menggunakan komputer tersebut, perayu pertama telah menghubunginya untuk mengetahui bagaimana hendak menggunakan kata laluan. Berikutan penemuan kecurian tersebut, perayu-perayu membawa polis ke tempat di dalam kilang di mana sebahagian mikrocip yang dicuri diperolehi. Perayu pertama kemudiannya membawa polis ke rumah di mana barang-barang curi selebihnya dijumpai. Serbuan polis di dua tempat lain menemui lebih banyak lagi mikrocip yang dicuri. Seorang yang membeli mikrocip daripada perayu pertama pada lima masa berbeza dipanggil untuk memberi keterangan. Perayu-perayu disabitkan berdasarkan keterangan keadaan dan inferens.

Diputuskan, menolak rayuan-rayuan:

(1) Pihak pendakwaan telah membuktikan keterangan yang memadai mengenai pelan yang diatur sebelumnya di antara perayu-perayu untuk melakukan kecurian tersebut dan ia dilaksanakan bersama-sama berikutan pelan tersebut (lihat perenggan 21).

(2) Terdapat keterangan yang memadai untuk menyokong sabitan dalam kes ini. Sabitan adalah selamat. Salah arah oleh majistret atas *standard* pembuktian ke atas perayu-perayu tidak menyebabkan ketidakadilan. Perbicaraan dilaksanakan dalam pematuhan substansial dengan Kanun Acara Jenayah dan salah laku tersebut boleh diperbetulkan di bawah s 422 Kanun (lihat perenggan 42).

(3) Tingkah laku perayu-perayu dalam membawa polis kepada penemuan ekshibit-ekshibit tersebut — daripada kabinet besi dalam kilang dan daripada rumah yang diduduki oleh SP8 (orang yang membeli mikrocip daripada perayu pertama) — adalah boleh diterima di bawah s 8 Akta Keterangan 1950 dan keterangan sedemikian boleh digunakan untuk menyokong dan memperkuatkan kes pihak pendakwaan (lihat perenggan 28).

(4) Hukuman-hukuman yang dikenakan ke atas perayu-perayu adalah wajar mengikut keadaan kes tersebut (lihat perenggan 43).]

Notes

For cases on inferences from facts, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 778–790.

Cases referred to

Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)

Bala anak Matik v PP [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)

Belhaven and Stenton Peerage (1875) 1 App Cas 278, HL (refd)

Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)

Chong Soon Wah v Public Prosecutor (Criminal Appeal No 2–05–103 of 2008), CA (refd)

Hasamuddin bin Talena v PP [2002] 2 MLJ 408; [2002] 2 CLJ 504, CA (refd)

Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250, SC (refd)

PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)

PP v Hanif Basree bin Abdul Rahman [2007] 2 MLJ 320; [2007] 2 CLJ 33, CA (refd)

PP v Ishak bin Hj Shaari & other appeals [2003] 4 MLJ 585, CA (refd)

PP v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274, HC (refd)

PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (refd)

PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 ML J 401, HC (refd)

Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)

Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141; [2010] 4 CLJ 529, FC (refd)

Yan Wing Lee v PP [1994] 2 CLJ 453, HC (refd)

Legislation referred to

Criminal Procedure Code ss 112, 422
Evidence Act 1950 ss 8, 27, 32, 114(g)
Penal Code ss 379, 380

RSN Rayer (R Nethaji Rayer & Co) for the appellants.
Amril bin Johari (Tan Guat Cheng with him) (Deputy Public Prosecutor) for the respondent.

Zamani A Rahim J:

[1] The appellants ('both accused') were charged with an offence under s 380 of the Penal Code which reads as follows:

1) The charge

> Bahawa kamu bersama-sama pada 21.4.2008 jam lebih kurang 9.30 pagi di Bahagian Pengeluaran Kilang Avago Kawasan Perindustrian Fasa 3, Bayan Lepas di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, telah melakukan kesalahan mencuri dalam bangunan yang digunakan sebagai tempat menyimpan harta dengan mengambil 2 kotak Integrated Circuits (IC) (1.6 juta unit) bernilai RM700,000.00 kepunyaan Kilang Avago, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 380 Kanun Keseksaan dan dibaca bersama di bawah seksyen 34 Akta yang sama.

[2] Having made out a prima facie case against both the accused at the close of the prosecution's case, their defence were called.

[3] At the conclusion of the whole trial, both the accused were found guilty, convicted and sentenced to two years imprisonment term with effect from date of conviction (ie 30 October 2010) and each to a fine of RM10,000 in default six months imprisonment.

[4] Both the accused were dissatisfied with the conviction and sentences, hence this appeal.

[5] The prosecution evidence may be summarised hereunder.

[6] The Security Manager, Mustapha bin Khamis, SP7 confirmed that the first and second accused were working at Avago Factory on 20 April 2008, the day the microchips ('exhs P4, P5 and P6') were reported stolen. The first and second accused were employed as security guards on the night in question.

[7] SP7 said that at about 9.30pm until 10.30pm the CCTV recording at the

scene of incident was reported not functioning. SP7 also confirmed the first accused was responsible to delegate the work as he was the leader of the night shift.

[8] SP3, SP4, SP5, SP6 and SP7 confirmed that the exhibits, namely, P4, P5 and P6 were reported missing on 25 April 2008 and they identified them as being the property of Avago Factory.

[9] SP3 confirmed that P4, P5 and P6 were placed on a trolley which was specifically meant for scrap items only (see trolley marked 'X' in photograph, P1C). SP3 also said the trolley had a padlock and its safety/security was under the responsibility of the first accused, being the leader of the night shift on 20 April 2008. Sometimes in March or April 2008, Muniandy a/l Arumugam, SP10 said the second accused had requested password of a CCTV from him. According to SP10 from the said password, one is able to make viewing, formating, adjustment and editing. Viewing means one may playback the incidents which had occurred; adjustment means one may adjust the brightness and zooming; formating means one may set up new programmes and editing means one may copy and paste it on the CCTV recording.

[10] According SP10, the second accused had requested the password from him in stern voice. Having been threatened, SP10 had no alternative but to give the password to the second accused. Upon being asked by SP10 why he needed the password, the second accused replied that he wanted to make viewing. SP10 told the second accused that he too wanted to be present at the viewing, but the second accused disallowed him to do so.

[11] Having obtained the password, the second accused said he did not know how to use a computer and told SP10 that the first accused would contact SP10 to enquire about the usage of the password. The first accused did call SP10, but SP10 did not tell him how to use the password.

[12] After this incident, SP10 went to see the second accused who told him not to reveal this to anyone. As he was scared, SP10 did not lodge a police report or informed his employer.

[13] According to C/Inspector Pamnaswaran a/l Arumugam, SP12 having interrogated the first and second accused on 21 May 2008, both accused led him to the Avago factory, Bayan Lepas. At the said factory, SP12 was taken by both accused to a place where they had kept the microchips. While on the way, the first accused had attempted to exculpate himself by telling SP12 that the second accused kept the microchips in a steel cabinet at the guard house.

[14] SP12 went on to say, he sought the permission of the security guard on

duty, namely, Kaliswaran to open the steel cabinet. The key to the cabinet was handed over to the second accused who opened the said cabinet. Upon opening the second cabinet, on its top part a plastic packet measuring 6x4 containing microchips were retrieved by the second accused. The exhibits were handed over to SP12.

[15] On 23 May 2008, at about 6.30am, SP12 was again led by the first accused to a house at Jalan Pantai Jerejak where he met one Tiow Choo Jin, SP8. Having searched the house, SP12 seized an aluminum box measuring 2x2 with several plastic packages in it containing microchips. SP12 confirmed that, part of the exhs P5 and P6 were found in the living room.

[16] On the same day (ie 23 May 2008), at about 1pm, SP12 was taken by SP8 to SMC at Bukit Tengah. At the said place, SP12 found a white and brown coloured boxes, and also a white-coloured gunny sack, all containing electronic chips. SP10 too confirmed that he found part of the exhibits, P5 and P6 in the office of the said premises, located on its first floor.

[17] According to SP8, in early 2008, the first accused came to meet him to discuss about the sale of microchips. SP8 identified and confirmed that the exhibits, P5 and P6 were the microchips shown to him by the first accused. He took the sample of the said microchips to enquire whether they were saleable. He met one Chee Wai Seong @ Peter for that purpose. Having been confirmed that they were saleable, SP8 bought them from the first accused. SP8 paid the first accused between RM6,000–RM7,000. All in all, SP8 had bought the microchips on five different occasions from the first accused. Having purchased part of the exhibits, P5 and P6, SP8 sold them to Chee Wai Seong.

[18] On 24 May 2008, at about 2pm, C/Inspector Yusmar Yadee, SP11 led a police party and raided a house No 27, Taman Limau, Bukit Mertajam belonging to Chee Wai Seong. In the search of the said house, SP11 seized ten gunny sacks containing the microchips. SP11 confirmed that part of the exhibits, P5 and P6 were found under the said house.

[19] According to the statement under s 112 of the CPC recorded from Chee Wai Seong, P26 he purchased all those microchips which were seized by the police from SP8. Chee Wai Seong did not testify, but his statement was tendered in pursuant to s 32 of the Evidence Act.

[20] For an offence of theft in a building under s 380 of the Penal Code, the prosecution is required to prove the elements of theft under s 379. And further elements as follows:

(1) that the property was at the time of theft in a building, tent or vessel; and

(8) that such building, tent or vessel, was then being used as a human dwelling or for the custody of property.

[21] Both the accused were charged with having committed the offence of theft in a building with common intention. It is, therefore, incumbent on the prosecution to establish the ingredient of common intention. As can be seen above, the prosecution had established sufficient evidence of a prearranged plan to commit theft of microchips at Avago Factory, Bayan Lepas and it was carried out in concert pursuant to that prearranged plan, see *PP v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401. In the *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 4 CLJ 529, the Federal Court had referred to *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274 where Kang Kwee Gee J had cited the passage in *Mallal's Current Law* common intention as follows:

> Al that was necessary for the prosecution to prove was that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed.

[22] In the instant case, the trial magistrate has made the findings of common intention as follows:

> Dalam kes semasa, daripada keterangan persekitaran, terdapat keterangan yang boleh dipercayai bahawa OKT pertama dan OKT kedua telah bertindak bersepadu dalam melakukan kesalahan mencuri dari kilang Avago dan kemudiannya dibawa keluar untuk dijual kepada SP8.

[23] In learned counsel written submission, he argued that the exhibits in this case were not found in the possession of both the accused. They were found in the cabinet at Avago Factory. The discovery of the exhibits pursuant to the information supplied by the second accused to ASP Pamnaswaran, SP12 was doubtful as the prosecution had failed to prove the information allegedly.given by the second accused. To support his contention, learned counsel had relied on case of *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408; [2002] 2 CLJ 504 where Gopal Sri Ram JCA (as he then was) who delivered the Court of Appeal judgment held (1):

> The exact words of the two statements allegedly made by the appellant during his interrogation and at the place where the drugs were discovered respectively were not reduced into writing as soon as it was practicable to do so. In respect of the first statement, there was no excuse for the interrogator's failure to take down the questions put to and the responses received from the appellant either during the interrogation or immediately thereafter. In respect of the second statement, the

interrogator should have put it down in writing in his diary as soon as he returned from the scene of the crime. The appellant's conviction, which rested squarely on these two statements, were therefore wholly unsafe.

[24] Learned counsel went on to submit that the prosecution also failed to prove the element of theft and no evidence, at the material time, that both the accused were present at the production line at the Avago Factory. However, there was evidence from SP7 that there were five to six persons on duty at that place on the day in question.

[25] In the instant case, the prosecution is relying on an inferential and circumstantial evidence to prove that both the accused had committed theft of two boxes of IC (1.6m units) valued at RM700,000 in the building in furtherance of common intention, on 21 April 2008 at about 9.30am at the production line of Avago Factory, Industrial Area Phase 3, Bayan Lepas. On the law of circumstantial evidence, I can do no better than to quote Lord Cairns' in the House of Lords case of *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at p 279:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you a endeavouring to dispel.

[26] In the Court of Appeal case of *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2007] 2 CLJ 33, Mohd Ghazali Yusoff JCA (as he then was) aptly described the test of circumstantial evidence at p 173 (MLJ); p 68 (CLJ) as follows:

> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chun Chwen Kong v Public Prosecutor* [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v Public Prosecutor* [1960] MLJ 96).

[27] The circumstantial evidence summarised by the trial magistrate at pp 7–8 of the appeal record are as follows:

(1) SP 3 mengesahkan bahawa kunci mangga bagi troli yang berisi barang-barang scrap adalah di bawah tanggungjawab pengawal keselamatan.

(2) SP 7 pula mengesahkan bahawa OKT 1 dan OKT 2 bekerja sebagai pengawal keselamatan pada hari kejadian 20.4.2008. SP 7 juga mengesahkan bahawa OKT 1 ialah ketua (leader) bagi shift malam pada hari kejadian dan OKT 2 juga ada datang ke kilang pada malam tersebut.

(3) SP 14 seorang technician memberitahu beliau pernah berjumpa dengan OKT 2 untuk membaiki CCTV yang rosak dan OKT 2 pernah meminta password CCTV tersebut dari beliau. OKT 1 juga pernah bertanya kepada SP 14 bagaimana menggunakan password tersebut.

(4) Siasatan SP 7 mendapati bahawa rakaman CCTV telah hilang sekitar jam 9.40 malam sehingga jam 10.30 malam iaitu malam kejadian di mana kedua-dua OKT bertugas.

(5) OKT 1 telah memandu arah SP 12 ke rumah SP 8 di mana barang-barang yang hilang dijumpai.

(6) SP 8 juga mengesahkan bahawa beliau ada membeli barang-barang P4, P5 dan P6 daripada OKT 1 dan menjualnya kepada Chee Wai.Seong.

Daripada kesemua keterangan ikut keadaan yang dikemukakan di Mahkamah ini, jelas bahawa OKT 1 dan OKT 2 telah terlibat berada di tempat kejadian pada hari kecurian berlaku. Rantaian keterangan juga menunjukkan bahawa OKT 1 telah menjual barang-barang yang dilaporkan hilang kepada SP 8 di mana barang-barang kes telah ditemui kemudiannya di beberapa tempat. Keterangan SP 14 juga menyatakan bahawa kerosakan CCTV didapati adalah daripada CCTV dan bukannya sistem. OKT 1 mahupun OKT 2 langsung tidak melaporkan kerosakan CCTV, jika ada, pada malam kejadian kepada pihak pengurusan Avago. Jelas penglibatan kedua-dua OKT dalam kehilangan rakaman CCTV hari kejadian.

[28] As regard both the accused subsequent conduct leading SP12 to the discovery of the exhibits in a steel cabinet was inadmissible under s 27 of the Evidence Act. No information or oral statement was disclosed which led to the discovery of the exhibits. On this point, I am agreeable with learned counsel that s 27 is inapplicable. However, the first accused conduct firstly, leading SP12 to SP8's house and secondly, the first and second accused leading SP12 to the steel cabinet at Avago Factory which caused the discoveries of the exhibits is admissible under s 8 of the Evidence Act and such evidence could be used to corroborate and strengthen the case for the prosecution: In the Federal Court case of *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 102, Arifin Zakaria CJ (Malaya) (as he then was) said:

> The inadmissibility of the information supplied by the appellant does not affect the admissibility of the evidence of her subsequent conduct under s 8 of the Evidence Act irrespective of s 27. As Chinnappa Reddy J said in *Prakash Chand v State* AIR SC 400 at p 404:
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> • The evidence of the circumstances, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapon which might have been used in the commission of the offence were found hidden,

would be admissible as conduct, under s 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously will or antecedent to such conduct falls within the purview of s 27 of the Evidence Act ((vide *Himachal Pradesh Administration v Om Prakash* AIR 1972 SC 975).

[29] In the Court of Appeal case of *Bala anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229, Zulkefli Makinuddin JCA (as he then was) said at p 531(MLJ); at pp 249–250 (CLJ) in the following words:

Be that as it may, we find that the law clearly permits such an evidence of pointing to the parang as shown in P32D to be admitted as conduct under s 8 of the Evidence At 1950. On this point the Supreme Court of India in the case of *Prakash Chand v State* AIR 1979 Supreme Court 400 at p 404 had this to say:

- What is excluded by s 162 of the Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where the stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible under s 8 of the Evidence Act irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of s 27 of the Evidence Act (vide *Himachal Pradesh Administration v Om Prakash* (AIR 1972 SC 975).

  Although the learned trial judge in the present case did not rely upon such an evidence as to the gesture or conduct of the appellant pointing to the parang used by him in slashing the two deceased persons, it is patently clear that such an evidence could be used to corroborate the prosecution case.

[30] Though the case of *Hasamuddin Telena*, was relied upon by learned counsel, it was not however, followed in the Court of Appeal case of *Chong Soon Wah v Public Prosecutor* (Criminal Appeal No 2–05–103 of 2008) where Tengku Dato' Baharudin Shah bin Tengku Mahmud JCA at p 15 said:

Learned counsel contended that His Lordship was not wrong to choose to be guided by the decision of this court in Hasamuddin Talena v Public Prosecutor [2002] 2 CLJ 504 *in insisting on the accused's exact words to be adduced in evidence. With respect, the Federal Court in Sum Kum Seng v Public Prosecutor* [1981] 1 MLJ 244, 245 *states the law to be otherwise,* which is that there is no strict necessity at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing under the provision of s 27 though it is desirable that the actual word be recorded. Exhibit P17 was recorded in accordance with that advice with the signature added as fortification. The apt observation by Suffian LP in *Chong Soon Keong v Public Prosecutor* [1977] 2 MLJ 78 also provides a guide in construing the said provision. This is what he said:

A It must also be observed that the legislature has used the expression information in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as statement, unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means to impart that knowledge.

B

[31] Having dealt with the circumstantial evidence itemised by the trial magistrate above and add or combine them together coupled with the accused subsequent conduct leading to the discoveries of the microchips which formed the subject matter of the charge, it is crystal clear that those evidence could be C used to corroborate and strengthen the prosecution case.

[32] Learned counsel also submitted there was self-contradiction in the evidence of SP12 relating to *who* opened the steel cabinet where the electronic chips were recovered. In his testimony, SP12 said he sought the permission of D a security guard, Kaliswaran to open the cabinet. Kaliswaran then handed over the key to the said cabinet to the second accused. The second accused opened it. Whilst in his police report, P14, SP12 stated that 'seterusnya saya arahkan pegawal keselamatan bernama Kaliswaran untuk membuka kabinet besi yang dalam keadaan berkunci (bermangga) sebaik kabinet dibuka saya nampak 1 E peket plastik lutsinar berisi dengan cip elektronik berada dalam laci tersebut'. Relying on the case of *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322, learned counsel argued that the prosecution has led two sets of evidence which contradict and strike at each other, as a result of which no reliable evidence was F left to form the basis of the accused conviction.

[33] There is no material contradiction as to who had unlocked the steel cabinet. In his police report, P14, SP12 directed Kaliswaran to open it, but there was no positive evidence that Kaliswaran who actually opened it. Under G cross-examination, SP12 explained in the following words:

> Saya setuju pengawal keselamatan Kaliswaran telah serah kunci kepada Hamid (ie second accused) dan Hamid buka kabinet itu. Saya tidak setuju apa berlaku tidak benar. Saya tidak setuju Kaliwaran sendiri yang buka kabinet itu.

H

> Peguambela — rujuk P14.
>
> Saya setuju saya arahkan Kaliswaran untuk buka kabinet itu. Saya setuju laporan saya betul.

I

> Saya tidak setuju orang yang buka kabinet itu Kaliswaran. Saya maksudkan 'untuk buka' maknanya 'untuk ambil kunci' tetapi tidak arahkan dia untuk buka kabinet itu.

In re-examination, SP12's went on to explain as follows:

> Saya tidak nyatakan dalam P14 Abd. Hamid sebenarnya yang buka kabinet itu. Sebab saya minta Kaliswaran untuk ambil kunci untuk membuka tapi saya tidak suruh untuk buka.

[34] Be that as it may, in any criminal trials contradictions and discrepancies in the prosecution or defence case, will always be there for various reasons eg. lapse of time from the date of incident to the date of giving evidence in court. In this case, SP12 testified after a lapse of two years and human memories are not infallible. On the issue of discrepancies. In *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63, Abdul Hamid J said:

> Discrepancies may in my view be found in any case for simple reason that no two persons can describe the same thing in exactly the same way. Sometime what may appear to be discrepancies are in reality, different ways of describing the same thing.

[35] In the Federal Court case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, Raja Azlan Shah FJ (as HRH then was) said at p 19, inter alia:

> … in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of series of events that took place in 1971–1973. In my opinion discrepancies there'll always be because in the circumstances in which the events happened, every witnesses does not remember the same thing and he does not remember accurately every single thing that happened … I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their version as too consistent …

[36] Finally, learned counsel submitted that Kaliswaran was a material witness for the prosecution. As he was not called the doctrine of adverse inference under s 114(g) of the Evidence Act had arisened against the prosecution in that, if Kaliswaran was called, his evidence would be unfavourable for the prosecution. The Federal Court case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1 was cited by learned counsel where Edgar Joseph FCJ (as he then was):

> It is clear law that while prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

[37] On the purported invocation of the presumption of adverse inference under s 114(g), learned counsel had gone on a frolic of his own as this issue was never raised in the petition of appeal filed by the accused. In *Yan Wing Lee v*

Public Prosecutor [1994] 2 CLJ 453, having referred to several authorities, Abdul Malik bin Ishak JC (as he then was) had this to say:

> From the authorities cited above, the legal situation appears to be that the appellant must abide by the petition of appeal and the learned counsel for the appellant, in all fairness to the learned deputy public prosecutor, should submit solely on the points of law or fact as set out in the petition of appeal and should not dabble on points of law or fact not set out in the petition of appeal. In my judgment, s 307(vi) of the Criminal Procedure Code (FMS Cap 6) is couched mandatorily and any failure to observe it would be fatal. In the circumstances, this court is entitled to disregard the grounds that were not itemised in the petition of appeal.

[38] In the event I have erred, I propose to exercise my revisionary powers in order to ensure that substantial justice has been observed. In the context of this case, I am in agreement with the learned deputy that Kaliswaran is not a material witness to unfold the narratives of the prosecution case. In the absence of Kaliswaran, there is no gap in the evidence for the prosecution case and the application of s 114(g) is not automatic. In the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250, Mohamad Azmi SCJ said:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn for withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[39] Having decided that the prosecution has made out a prima facie case as charged, the accused defence was called. The learned trial magistrate had considered both the defence of the first accused and second accused in great details. She found that their defences were mere denial and afterthought. Their defences have failed to dislodge the prosecution case. The learned trial magistrate concluded that the accused has failed to raise a reasonable doubt in the prosecution case. Thus, the prosecution has succeeded to prove its case beyond reasonable doubt. To be exact, this is how the trial magistrate wrote in respect of the burden on the accused:

> OKT 1 dan OKT 2 gagal menimbulkan sebarang keraguan yang munasabah di dalam kes ini. Beban yang dipukul pendakwaan telah berpindah kepada OKT 1 dan OKT 2 atas *imbangan kebarangkalian bagi menimbulkan keraguan di dalam kes pihak pendakwaan.*

[40] Even though at the conclusion of the trial, learned counsel for first and

second accused did not raise the issue of the burden or standard of proof in their written submission, it was, however, listed in the last paragraph (No 17) of their joint petition of appeal.

[41] At first the trial magistrate was correct in law on the burden or standard of proof to say that the first and second accused has failed to raise any reasonable in the prosecution case. However, the next sentence was mind boggling when she said 'beban yang dipikul pendakwaan telah berpindahkan kepada OKT 1 dan OKT 2 atas *imbangan kebarangkalian bagi menimbulkan keraguan* di dalam kes pendakwaan'. It would appear that the trial magistrate had lumped up both burdens together and made no distinction between the two burdens: see Supreme Court Criminal Appeal *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421. In the instant case the burden to rebut on the balance of probabilities (ie *imbangan kebarangkalian*) has no application at all. To appreciate the burden of proof, be it on the prosecution or defence, I would advise the lower court to read and read the judgment of Mohamad Azmi SCJ in the Supreme Court case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169.

[42] Having regard that there is sufficient evidence to support the conviction in this case, the conviction is safe. The misdirection on the standard proof on the first and second accused has not occasioned a miscarriage of justice or failure of justice. The trial herein has been conducted in substantial compliance with the Criminal Procedure Code. Despite a misdirection on the burden or standard of proof as alluded above, it is curable under s 422 of the same Code on the authority of Court Appeal case *Public Prosecutor v Ishak bin Hj Shaari & other appeals* [2003] 4 MLJ 585, where Mohd Noor Ahmad JC said:

> And the misdirection on the standard of proof at the end of the trial involves a breach of the basic principle of criminal law, that is to say, the cardinal principle in criminal law is the duty of the prosecution to prove the guilt of the accused beyond all reasonable doubt. In short, the first breach is a breach of an explicit provision of the CPC and the second breach involves a principle of general importance in the administration of justice. Although the respective learned High Court judge had given the right reasons for the breaches, with due respect, we do not agree with the conclusions that the misdirections were illegalities for which s 422 of the CPC could not be invoked to cure the breaches without proper consideration as to whether or not the misdirection had occasioned a failure of justice. The words 'unless such error, omission or irregularity … has occasioned a failure of justice' at the end of s 422 qualify the entire section. In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answers to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice. If the

A answers are negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused. But, none of the learned High Court judges in these appeals did really consider whether or not the misdirection had occasioned a failure of justice. They simply struck it down as an illegality for the aforesaid reasons. With due respect, we B are of the opinion that such approach is not in consonance not only with the modern trend but also not in keeping along with certain well-established and well-understood lines that accord with our notion of natural justice that can be discerned from the Indian experience.

… Whatever it is what remains to be considered is whether there is sufficient C evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice. The same consideration applies to the misdirection at the end of the case. Therefore, we conclude that the misdirection on the standard of proof in a trial which has been conducted in substantial compliance with the CPC is curable under s 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error D has not occasioned a failure of justice.

[43] Now I come to sentence. On the sentence of two years imprisonment from the date of conviction (ie 30 October 2010) and a fine of RM10,000, in default six months imprisonment on each accused is adequate in the E circumstances of this case.

[44] Accordingly, the accused appeal on conviction and sentence is hereby dismissed.

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Appeals dismissed.

Reported by Ashok Kumar

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